SHARIFF KADIR

v.

PP

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
MOHD GHAZALI YUSOFF JCA
[CRIMINAL APPEAL NO: K-05-52-1997]
9 SEPTEMBER 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in dangerous drugs - Presumption of trafficking under s. 37(da) was invoked based on presumption of possession under s. 37(d) - Rule against double presumption - Whether trial judge had misdirected himself - Whether conviction ought to be quashed*

The appellant was arrested whilst carrying a sack containing 12,793g of cannabis. The prosecution's case was that as the appellant was in custody or control of the said drugs, he was presumed to be in possession under s. 37(d) of the Dangerous Drugs Act 1952 ('the Act') and therefore in actual possession and hence guilty of trafficking under s. 39B of the Act by virtue of the presumption of trafficking under s. 37(da) of the Act. The High Court upheld the prosecution's contention. The trial judge convicted the appellant under s. 39B of the Act for trafficking and sentenced him to death. Dissatisfied, the appellant appealed against the said finding.

Held:
Per Gopal Sri Ram JCA

[1] The rule against double presumption requires a trial judge to carry out a separate exercise under s. 37(da) of the Act when determining whether an accused is found in possession. That is, the presumption of possession under s. 37(d) of the Act is separate and distinct from the "found in possession" appearing in the proscription created by s. 37(da) of the Act. In the present case, the trial judge had clearly misdirected himself as reflected in his judgment in that it had offended the rule against double presumption. (p 867 e)

[2] It would be unsafe for this court to invoke the proviso to s. 60 of the Courts of Judicature Act 1964 based on the present facts. The prosecution had failed to prove anything more than the negotiations that took place

between the agent provocatuer of the police and the appellant. In addition, there was evidence that the drugs had come from a friend of the appellant. (p 867 g)

[3] The appellant's conviction under s. 39B of the Act was quashed but was substituted with a conviction under s. 6 read with s. 39A(2) of the Act. (p 867 h)

[4] In light of the seriousness of the offence, the appellant was sentenced to 20 years' imprisonment to take effect from the date of his arrest. However, the accused would not be whipped because of his age. (p 868 a & d)

[Appeal allowed; conviction under s. 39B quashed and substituted with s. 6 read together with s. 39A(2) of Act.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu ditangkap ketika membawa sekarung guni yang mengandungi 12,793g cannabis. Kes pendakwaan ialah, oleh kerana perayu mempunyai jagaan atau kawalan terhadap dadah maka beliau adalah diandaikan mempunyai milikan di bawah s. 37(d) Akta Dadah Berbahaya 1952 ('Akta'), dan kerana itu mempunyai milikan sebenar dan seterusnya melakukan perbuatan mengedar di bawah s. 39B Akta berdasarkan andaian pengedaran di bawah s. 37(da) Akta. Hujahan ini telah diterimapakai oleh Mahkamah Tinggi. Hakim perbicaraan seterusnya mensabitkan perayu dengan kesalahan mengedar di bawah s. 39B Akta dan menjatuhkan hukuman mati. Tidak berpuas hati, perayu merayu terhadap keputusan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Rukun andaian berganda menghendaki hakim perbicaraan membuat pertimbangan berasingan di bawah s. 37(da) Akta dalam memutuskan sama ada dadah berkenaan berada dalam milikan tertuduh. Andaian milikan di bawah s. 37(d) Akta berasingan dan berlainan daripada ungkapan "found in possession" dalam pengharaman yang diwujudkan oleh s. 37(da) Akta. Dalam kes semasa, keputusan hakim perbicaraan menunjukkan bahawa dia telah tersalah-arah dirinya kerana mengingkari rukun andaian berganda.

[2] Tidaklah wajar untuk mahkamah ini untuk memakai proviso kepada s. 60 Akta Mahkamah Kehakiman 1964 berpandukan fakta-fakta semasa. Pendakwa gagal membuktikan bahawa apa yang berlaku adalah lebih daripada rundingan di antara agen provokatur polis dan perayu. Tambahan pula, terdapat bukti bahawa dadah tersebut datang dari kawan perayu.

[3] Sabitan perayu di bawah s. 39B Akta dibatalkan tetapi diganti dengan sabitan di bawah s. 6 dibaca bersama s. 39A(2) Akta.

[4] Memandangkan kesalahan ini agak serius, perayu dihukum penjara 20 tahun berkuatkuasa dari tarikh penangkapannya. Bagaimanapun, perayu tidak dihukum sebat disebabkan umurnya.

Rayuan dibenarkan; sabitan di bawah s. 39B dibatalkan dan digantikan dengan sabitan di bawah s. 6 dibaca bersama s. 39A(2) Akta.]

Case(s) referred to:
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Dangerous Drugs Act 1952, ss. 37(da), 39A(2), 39B

For the appellant - G Ravishankar; M/s R Shankar Gandhi & Assoc
For the respondent - Kamal Baharin Omar DPP

[Appeal from High Court, Alor Setar; Criminal Trial No: 45-2-1996]

Reported by M Maheswaran

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

The appellant before us was convicted of an offence under s. 39B of the Dangerous Drugs Act 1952 ('the Act'). The mandatory sentence prescribed by law was imposed on him. The facts which form the foundation of the case against the appellant are in the main undisputed and may be shortly stated.

PW3, a detective corporal acting as an agent provocateur, made contact with the appellant. They had several meetings. From the evidence, it transpired that they met about four times. This is how PW3 describes this meeting:

> Pada 14.11.94 jam lebih kurang 11 pagi, saya sekali lagi pergi ke kawasan Kota Kuala Muda, iaitu di kawasan Kampung Sungai Derhaka. Apabila sampai, saya pergi ke rumah laki-laki yang bernama Namat. Saya berjumpa dengan lelaki yang bernama Namat itu dan memperkenalkan diri saya sebagai 'Osman' yang datang dari Taiping. Saya pelawa kepada lelaki itu akan hajat saya untuk membeli sejumlah ganja daripadanya. Dia beritahu saya bahawa pada ketika itu dia tidak mempunyai ganja yang saya kehendaki. Dia minta tempoh sedikit hari untuk dia dapatkan pertolongan kawannya untuk dapatkan

ganja itu. Saya pun setuju. Saya pun balik. Sebelum balik saya beritahu Namat yang saya akan datang semula ke rumahnya. Saya boleh cam orang yang bernama Namat ini. (Tertuduh dicam).

Pada 28.11.94 jam lebih kurang 11.30 pagi, saya pergi semula ke Kampung Sungai Derhaka. Saya bertemu semula dengan Tertuduh. Saya jumpa Tertuduh di tepi jalan. Saya ada berbual dengan dia. Saya bertanyakan bekalan ganja yang saya pesan tempoh hari. Dia kata dia belum dapat lagi berhubung dengan kawan yang dia maksudkan, dan bekalan ganja itu belum ada dalam simpanannya. Saya pun balik.

Pada 23.1.95 jam lebih kurang 11 pagi, saya sekali lagi pergi ke Kampung itu dan bertemu dengan Tertuduh. Saya pergi ke rumah Tertuduh dan bertanyakan bekalan ganja yang saya pesan itu. Tertuduh sekali lagi beritahu yang bekalan ganja itu belum dapat diadakan. Dia berjanji kepada saya akan cuba dapatkan bekalan itu. Tertuduh meminta tempoh sedikit hari lagi. Sebelum saya balik, Tertuduh beri nombor telefon rumahnya kepada saya. Tertuduh minta saya hubunginya dengan telefon. Saya pun balik.

Pada 21.2.95 jam lebih kurang 3 petang, saya menalipon Tertuduh. Saya dapat berbual dengannya melalui telefon. Saya sekali lagi bertanya kepada Tertuduh tentang bekalan ganja yang saya pesan tempoh hari. Tertuduh telah beritahu saya bahawa beliau telah mendapat bekalan ganja yang dipesan dari kawannya untuk diberikan kepada saya. Tertuduh meminta saya datang ke Kota Kuala Muda dan saya bersetuju. Saya beritahu tertuduh yang apabila saya sampai di Kota Kuala Muda saya akan menghubunginya dengan talipon. Tertuduh setuju dengan cadangan saya. Saya meminta tertuduh yang saya menghendaki ganja sebanyak 20 kilo. Tertuduh setuju. Saya ada tanya harga. Harganya ialah RM1,200 untuk satu kilo.

Saya minta Tertuduh kurangkan harga itu. Tertuduh tidak beritahu apa-apa apabila saya minta kurangkan harga. Saya berjanji dengan tertuduh yang saya akan sampai pada malam itu.

As may be seen, the last communication between the appellant and PW3 resulted in an arrangement for them to meet. Following this conversation, PW3 briefed his superior, PW4, who took steps to arrange an ambush for the purpose of apprehending the appellant. At the arranged time, PW3 met the appellant who asked the former to follow him. PW3 did so. A distance away from the scene of the meeting PW3 entered a lane, pointed out to him by the appellant who thereafter followed him on foot. After travelling a short distance, PW3 noticed that the appellant was missing. PW3 then saw the appellant carrying something in his hand emerging from another lane. PW3 then accelerated his car and moved away. Almost immediately thereafter PW4 and the police party accompanying him emerged and apprehended the appellant. On apprehension, it was discovered that the appellant was carrying a sack containing what subsequent chemical analysis proved to be 12,793 grams of cannabis.

At the trial of the appellant, the prosecution contended that it had established a case of trafficking based on the fact that the appellant had been found in possession of the proscribed drug. In short, the prosecution relied on the presumption under s. 37(d) read together with s. 37(da). To put in another way, it was the prosecution's argument that the appellant had custody or control of the drug in question and was therefore in presumed possession (s. 37(d) of the Act) so that he was found in possession and hence guilty of trafficking (s. 37(da) of the Act). The learned deputy who has very ably responded to this appeal, has frankly conceded that this was the tack of the prosecution case in the court below. The learned judge accepted this as reflected in the following passage in his judgment, drawn to the learned deputy's attention by our learned brother, Mohd Ghazali Mohd Yusoff JCA:

> At the close of the case for the prosecution, after listening to submissions, I was satisfied that the prosecution had succeeded in proving beyond reasonable doubt that the accused had in custody or under his control the seven packages containing the cannabis and therefore the dual presumptions under section 37(d) and section 37(da)(vi) of the DDA apply.

Now this is a clear misdirection in what otherwise is a very well written and carefully considered judgment. It offends what has come to be known as "the rule against double presumption". That is the shorthand description for the principle established in the case of *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170 FC. What the rule requires is that a trial judge should carry out a separate exercise under s. 37(da) when determining whether an accused is found in possession. In other words, the presumption of possession under s. 37(d) is separate and distinct from the phrase "found in possession" appearing in the proscription created by s. 37(da) of the Act.

The learned deputy has eloquently argued that we ought not nevertheless to intervene because this is an appropriate case where the proviso to s. 60(1) of the Courts of Judicature Act 1964 may be safely invoked. The learned deputy must forgive us if we find ourselves unable to accept this submission.

As pointed out by our learned brother Abdul Kadir Sulaiman JCA in the course of argument, this is a case in which the prosecution had plainly failed to prove anything more than negotiations. Additionally there was some evidence that the drug came from a friend of the appellant. Having regard to the particular facts and circumstances of this case, we are of the view that it would be unsafe for us to invoke the proviso. The substance of the evidence simply does not warrant it.

It follows therefore from what we have said thus far, that the appellant's conviction under s. 39B cannot stand. It is quashed. In its place, we would substitute a conviction under s. 6 read with s. 39A(2) of the Act.

Having heard arguments from counsel for the appellant and the learned deputy public prosecutor we are of the opinion this is a very serious offence. Quite properly learned counsel for the appellant had not sought to water down the seriousness of the offence committed by his client or the circumstances in which it was committed.

In passing sentence, we are duty bound to give paramount consideration to public interest. We note the rampant commission of offences such as the present despite the vigilance of the police and untiring efforts by the elected Government to stamp out drug related offences.

We will be failing in our duty, if we did not, when passing sentence reflect the gravity of the offence in which the appellant has been convicted.

Having taken into account all the relevant material before us, including the age of the appellant and other elements of mitigation operating in his favour, we would impose a tenure of 20 years' imprisonment which is to take effect from the date of the appellant's arrest. Because of his age, no sentence of whipping may be passed on the appellant.

Before concluding, we would record our appreciation for counsel for the appellant and the learned deputy public prosecutor without whose assistance this oral judgment would not have been possible. This appeal is allowed.